

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of Michael Joseph  
Marciniak, doing business as Budget  
Pro Construction, Inc. and Budget Pro  
Construction

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on for a hearing before Administrative Law Judge Barbara L. Neilson on October 22, 2004, at 1:30 p.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Commerce ("the Department"). There was no appearance by or on behalf of the Respondent, Michael Joseph Marciniak, doing business as Budget Pro Construction, Inc., and Budget Pro Construction. The OAH record closed on October 22, 2004.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

## **STATEMENT OF ISSUES**

The issues presented in this case are whether the Respondent, Michael Joseph Marciniak, doing business as Budget Pro Construction, and Budget Pro Construction, engaged in unlicensed residential building contractor or remodeler activity, filed a license application that contained false or misleading statements, performed negligently or in breach of contract, engaged in fraudulent, deceptive, or dishonest practices, has been shown to be incompetent, untrustworthy, or financially irresponsible, and engaged in conduct that was the basis for a contractor's recovery fund payment and such payment has not been reimbursed, in violation of Minn. Stat. §§ 326.84, subd. 1a and 326.91, subd. 1(1), (2), (4), (6), and (10); and, if so, whether the Respondent should be censured or civil penalties should be imposed against Respondent pursuant to Minn. Stat. §§ 45.027, subds. 6 - 7, and 326.91, subd. 1.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges initiating this contested case proceeding was served on the Respondent, Michael Joseph Marciniak, doing business as Budget Pro Construction, Inc. and Budget Pro Construction, via first class mail on September 13, 2004, at the following addresses: Michael Joseph Marciniak, 310 North 63<sup>rd</sup> Avenue West, Duluth, MN 55807, and Michael Joseph Marciniak, 212 Avenue C, Duluth, MN 55720.<sup>1</sup>

The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges contained the following language:

The Respondent's failure to appear at the prehearing conference may result in a finding that the Respondent is in default, that the Department of Commerce's allegations contained in this Notice and Order may be accepted as true, and its proposed action may be upheld.<sup>2</sup>

The Respondent did not make any request prior to the October 22, 2004, prehearing conference for a continuance or any other relief. The Respondent did not personally appear at the prehearing in this matter scheduled for October 22, 2004, or have an appearance made on his behalf.

Because the Respondent failed to appear at the prehearing conference in this matter, he is in default.

Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges are hereby taken as true and incorporated into these Findings of Fact.

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<sup>1</sup> Affidavit of Service by First Class Mail of Jean-Anne Gates attached to Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges.

<sup>2</sup> Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges, p. 5.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges issued by the Department was proper and the Department has fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Respondent, having made no appearance at the prehearing conference, and not requesting any continuance or relief, is in default. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges are hereby taken as true.

4. By engaging in unlicensed residential building contractor or remodeler activity, filing a license application that contained false or misleading statements, performing negligently or in breach of contract, engaging in fraudulent, deceptive, or dishonest practices, demonstrating that he is incompetent, untrustworthy, or financially irresponsible, and engaging in conduct that was the basis for a contractor's recovery fund payment and failing to reimburse such payment, the Respondent has violated Minn. Stat. §§ 326.84, subd. 1a and 326.91, subd. 1(1), (2), (4), (6), and (10). The Respondent is subject to discipline, censure and/or civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6 - 7, and 326.91, subd. 1, and the imposition of sanctions is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce discipline, censure and/or impose an appropriate civil penalty against the Respondent Michael Joseph Marciniak, doing business as Budget Pro Construction, Inc., and Budget Pro Construction.

Dated: October 26, 2004

/s/ Barbara L. Neilson  
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BARBARA L. NEILSON  
Administrative Law Judge

### **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

Reported: Default.